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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

REPLY TO OPPOSITION TO PETITIONS FOR RECONSIDERATION REGARDING ACCESS TO POLES, CONDUITS AND RIGHTS-OF-WAY

Continental Cablevision, Inc., Jones Intercable, Inc., Century Communications Corp., Charter Communications Group, Prime Cable, InterMedia Partners, TCA Cable TV, Inc., Greater Media, Inc., Cable TV Association of Georgia, Cable Television Association of Maryland, Delaware & the District of Columbia, Inc., Montana Cable TV Association, South Carolina Cable Television Association, Texas Cable & Telecommunications Association (collectively "Joint Cable Parties"), respectfully submit this Reply to various utility pole owner oppositions to the petitions for reconsideration concerning access to poles, conduits and rights-of-way.

I. THE COMMISSION SHOULD NOT RECONSIDER ITS FINDING THAT THE NON-DISCRIMINATORY ACCESS PROVISION OF SECTION 224 APPLY TO ALL UTILITY TELECOMMUNICATIONS FACILITIES

UTC and the American Public Power Association ("APPA") in their October 31, 1996 submissions, through a misplaced and incorrect interpretation of the term "telecommunications," seek to eviscerate the non-discriminatory access provisions of Section

224.[1] They argue, in essence, that the non-discriminatory access obligations of Section 224 apply if, and only if, a utility pole owner provides common carrier services within the definition of the *NARUC* line of cases.[2] The utilities urge the Commission to find that no access obligation exists where the utility makes "excess capacity available to a restricted number of persons who would *themselves* be" offering common carrier services.[3] This argument is nothing more than a recapitulation of rejected arguments that they need not make capacity available to third parties if there is leaseback/resale capacity available on their own "internal" communications networks.[4] The Commission has long utility efforts to use leaseback to thwart facilities-based competition,[5] and must do so again here.

In the *Interconnection Order,* the Commission cautioned against "utility-imposed restrictions that could be used unreasonably to prevent access . . . in particular [where] a utility . . . [is] engaged in video programming or telecommunications services."[6] In furtherance of this objective, the Commission rightly limits electric utilities to space reservations pursuant to a "*bona fide* development plan that reasonably and specifically projects a need for [reserve] space in the

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[1]47 U.S.C. § 224(f)(1).

[2]*National Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir.) ("NARUC I"); *National Ass'n of Reg. Util. Comm'rs v. FCC,* 533 F.2d 601, 608 - 09 (D.C. Cir.), *cert denied,* 425 U.S. 992 (1976) ("*NARUC* II").

[3]Reply Comments of APPA In Support of Its Petition For Clarification or Reconsideration of the Commission's First Report & Order at 3.

[4]*Implementation of the Local Competition Provision in the Telecommunications Act of 1996,* First Report and Order, FCC 96-325, CC Docket No. 96-98, ¶ 1164 (rel. Aug. 8, 1996) ("*Interconnection Order*").

[5]*See, e.g., Section 214 Certificates*, 21 F.C.C.2d 307, 324 - 27 (1970); *General Tel. Co. of Southwest v United States*, 449 F.2d 846, 851 (5th Cir. 1971).

[6]*Interconnection Order* ¶ 1150.

provision of core utility service."[7] The Commission was very clear that utilities cannot deny access to pole and conduit space on the basis that existing communication capacity is available for lease.[8] Knowing that equal access can be denied not only through claimed reservations of space, but also through discriminatory pole permit processing (*e.g.*, delaying third parties' attachment requests, while allowing immediate attachment by its telecommunications affiliate or preferred providers) and by the imposition of discriminatory attachment charges (both rental rates and non-recurring makeready inspection and other charges), the Commission found that:

> Section 224(f)(1) requires non-discriminatory treatment of all providers of such services and does not contain an exception for the benefit of such a provider on account of its ownership or control of the facility or right-of-way. . . . Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the non-discrimination that Congress required.[9]

But such favoritism is exactly what the utilities seek.

From this clear and common-sense reading of the statute, the utilities argue that unless an electric utility supplies telecommunications services that fall ***strictly*** within the definition of common carriers as articulated in the *NARUC* line of cases, that utility is beyond the reach of Section 224(f)(1). They advocate not the creation of facilities-based competition as Congress requires,[10] but unchecked build-out of utility facilities under the guise that such build-

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[7] *Interconnection Order* ¶ 1169.

[8] *Interconnection Order* ¶ 1164 ("We will not require telecommunications providers or cable operators seeking access to exhaust any possibility of leasing capacity from other providers, such as through a resale agreement, before requesting a modification to expand capacity").

[9] *Interconnection Order* ¶ 1170.

[10] 47 C.F.R. §1.1414(a).

out is for "internal communications"[11] where all unaffiliated parties are driven into leaseback or resale arrangements. The Commission should deny the erroneous interpretation of the term "telecommunications" that the utilities seek.

II. THE COMMISSION SHOULD NOT RECONSIDER ITS CORRECT FINDING THAT THE STATUTE FORBIDS ILECS FROM RESERVING POLE SPACE

In its Opposition and Comments, BellSouth seeks to overturn the Commission's correct finding that "[p]ermitting an incumbent LEC . . . to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC,"[12] and its finding that "Section 224(f)(1) prohibits such discrimination . . ."[13] BellSouth, however, argues that because its facilities are deployed on an increasing number of poles owned by electric utilities, and because Section 224(a)(5) excludes BellSouth from those entitled to non-discriminatory access under Section 224(f)(1), it should be permitted to reserve space on not only its own poles, but on electric utility poles as well to rectify what it characterizes as a "competitive imbalance."[14]

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[11]*See* Opposition to Petitions for Reconsideration of Continental Cablevision, Inc. *et al.* at 8 - 9.

[12]*Interconnection Order* ¶ 1170. The Local Exchange Carrier Coalition ("LECC") made a similar argument in its Petition for Reconsideration and Clarification, *see* LECC Petition at 22, claiming that incumbent local exchange carriers ("ILECs") face similar forecasting and planning issues as electric utilities and should thus be granted identical space reservation rights. In addition to the fact that Section 224(f)(2) does allow some modest deference to electric utilities on access questions relative to the provision of core electric service which Congress expressly did *not* extend to ILECs, LECC's position like BellSouth's, would overturn a cornerstone of the pole provisions of the *Interconnection Order*: that ILEC reservation of pole space would be detrimental to facilities-based competition by favoring the future needs of the ILEC over the present needs of the new entrant. *Interconnection Order* ¶ 1170.

[13]*Interconnection Order* ¶ 1170.

[14]BellSouth Opposition and Comments at 13.

BellSouth and other ILECs are in an equal bargaining position with electric utilities, unlike cable operators and other attaching third parties that generally have been forced to sign whatever contract of adhesion either the telephone or electric utility imposes upon them.[15] BellSouth should use that bargaining position and its long-standing relationships with its electric utility counterparts to address any dissatisfaction with current pole attachment arrangements. There is no basis in the statute for BellSouth's proposed "fix" and the Commission should not create one.

[15] *See, e.g., First Report & Order in CC Docket No. 78-144*, 68 F.C.C.2d 1585 (1978); *Wytheville TeleCable Dev. Co. v. Appalachian Power Co.*, PA-79-007, 48 R.R.2d 684 (1980); *Gulfstream Cablevision of Pinellas Co., Inc. v. Florida Power Corp.*, PA-84-0016, Mimeo No. 35810 ¶ 4 (May 17, 1985); *Capital Cities Cable, Inc. v. Southwestern Pub. Serv. Co.*, PA-85-0005, Mimeo 6957, ¶¶ 2 - 3 (Sept. 13, 1985).

CONCLUSION

For the foregoing reasons, the Joint Cable Parties respectfully request the Commission to deny the Petitions for Reconsideration and Opposition to Petitions for Reconsideration of the utility parties in a manner consistent with this Reply and the Joint Cable Parties' Opposition filed October 31, 1996 in this proceeding.

Respectfully submitted,

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November 12, 1996

CERTIFICATE OF SERVICE

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